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War Tax Refusal: Some Code Problems

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War Tax Refusal: Some Code Problems

*William Louis Tabac**

AFTER SEVERAL YEARS OF REFUSING to pay his poll taxes to the Commonwealth of Massachusetts as a protest against the Mexican War, Thoreau was arrested and confined for a night to the jail in Concord. A friend, probably Emerson, paid Thoreau's delinquent taxes and got him released the next day. That concluded Thoreau's famous act of conscience. The paradigm of civil disobedience, as one writer has called it,[1] had a profound effect on Thoreau and many who have since considered his classic, *Civil Disobedience*; but it had absolutely no effect upon those who waged the Mexican War. By comparison, Ghandi's experience with tax refusal was significantly different. As history demonstrates, Ghandi was able to work it into a revolution that drove the British from India.

Throughout our history, many individuals and groups have employed tax refusal to make their points. The Boston Tea Party, for example, was a protest against taxes, not tea; and dissident Quakers have occasionally joined together to stop paying taxes as an objection to war. Yet despite Ghandi's success, a protest based on tax refusal has never won a significant number of adherents in this country. There are several reasons for this, but the most pervasive seem to be the fear most people have of going to jail and the confusion that exists in their minds about the limits of the power of the Internal Revenue Service (I.R.S.), that is, what this agency can and cannot do to people who do not pay their taxes. Until some of their doubts are answered, the antiwar masses will continue to cling to their placards and keep close step in the peace marches, while the IndoChina war rages around them.

Yet frustration with government policies and cynicism about the leaders who create them are driving more and more Americans toward radical forms of dissent. People are less willing to believe that the most effective way to reach Washington is through the U. S. Post Office or by taking to the streets to sing out their protests. Civil disobedience is on the increase and struggling for status among protestors. So far attacks against the "establishment," its mores and property, have alternated between passive law breaking, such as tax and draft refusal, to the increasingly commonplace destruction of that which the protestor detests. But the mix is not equal, and this is demonstrated dramatically in the case of tax refusal. Although the number of bomb threats and actual bombings is up significantly over figures for previous years,[2] the number

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[1] Bedau, Civil Disobedience: Theory and Practice 120-121 (1969).

[2] According to the Treasury Department, 4500 terrorist bombings occurred between January 1, 1969 and April 1, 1970. Friedman, Guerilla Warfare Seen in U.S., The Cleveland *Press*, Sept. 10, 1970, § C, p. 6, col. 1.

HeinOnline -- 20 Clev. St. L. Rev. 215 1971

of tax refusers[3]—those people who are not paying some portion of their excise and income taxes as their protest against IndoChina policy—heralds a movement that one observer[4] claims is becoming a fashionable one, a status that terrorism could never hope to achieve.

Principled Tax Refusal

Until the 1940's tax protest was largely a matter of individual conscience. Pacifists who had refused historically to drop bombs on people concluded that they could not logically buy the bombs to let others drop them; through tax refusal these pacifists tried to divorce themselves from all complicity with the war-making effort. In 1947, out of the War Resister's League, a traditional pacifists group, emerged the Peacemaker Movement, a tax refusing pacifist organization. About 250 persons met in Chicago that year and formed the Movement, which had at that time the sole purpose of resisting the payment of taxes used for military purposes. Today, aside from the *Handbook on Nonpayment of War Taxes* it publishes, the Peacemakers gather news about all aspects of the protest movement for the *Peacemaker,* a periodical it publishes once every three weeks.

The *Peacemaker* is also beginning to serve another function which its creators probably did not foresee for it. Recently, through a device known as an "alternative fund," tax and draft refusers have joined together for mutual support. These alternative funds, consisting of monies that represent the amount of taxes refused by participants in the funds, are being used for two purposes: to publicize tax and draft refusal; and to provide financial support to refusers who, because of their protest, either cannot obtain employment or do not wish to obtain it. The *Peacemaker* will serve as a clearinghouse so that individual alternative fund groups may learn about others and what they are doing, and about tax and draft refusers who may be in search of a fund.

Many peace groups followed the lead of the Peacemakers and began propagandizing tax refusal as a viable protest. Only a small number of people, however, actually began practicing this form of civil disobedience. Several reasons existed then, as they do now, for the reluctance of the masses to stop paying their taxes; and, as suggested earlier, the most important of them is the fear people harbor of going to jail. Another reason why war tax refusal has not challenged the masses is, no doubt, the pervasiveness of the federal tax lien which guarantees that if

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[3] A figure that is difficult to determine. The Peacemaker Movement, the chief war tax refusing organization, claims that the number of telephone excise tax refusers alone approaches 18,000. Peacemaker Movement, Nonpayment of War Taxes 47 (3rd rev. ed. 1967). A more recent estimate placed the number of excise tax refusers at 100,000. The Peacemaker, Jan. 16, 1971, p. 5. In 1968, a group called "Writers and Editors War Tax Protest" obtained over 400 signatures in support of tax refusal. N. Y. *Times,* Jan. 31, 1968, p. 40.

[4] Bedau, Civil Disobedience: Theory and Practice, *supra,* n. 1, at 120-121.

HeinOnline -- 20 Clev. St. L. Rev. 216 1971

the taxpayer has assets and does not conceal them the government will, if it wishes, collect its tax. The *Handbook* deals with these concerns, making Thoreau's argument that tax refusal is justified simply for the sake of one's conscience, for even if the government will always collect the tax the significance of the protest is found in the fact that the refuser is not paying it. The *Handbook* deals less adequately, however, with the question that most affects the potential tax refuser, namely, "What will the government do to my life?" The only hard lesson the *Handbook* teaches about this is that one cannot predict what the government will do, a realization that could very well drive borderline tax refusers back to their banners and peace marches.

The withholding system has also worked to inhibit the tax refusal movement. A variation of the federal tax lien, the withholding system collects income taxes before they are due. At the dawn of the tax refusal movement, clergymen swelled the ranks of tax protestors and could, as clergymen, avoid the withholding of taxes.[5] By comparison, most taxpayers are subject to the withholding tax on wages that Congress enacted during the Second World War to guarantee a ready supply of dollars for the war effort. Consequently, serious protestors who have taxes withheld can either urge their employers to stop withholding the tax—which means that their employers would, should they agree to this, subject themselves to severe criminal and civil penalties[6]—or quit their jobs and try to earn withholding free income or too little income to be taxed.[7] Even peace groups, until recently, were reluctant to stop withholding taxes from the wages of employees who wished to refuse them, and many individuals chose to give up their jobs, often with extreme hardship, so they could continue their protest. Of course, most protestors were, and still are, unwilling to do that. Instead, they compromise their protest by not paying either the telephone excise tax, whatever tax that remains to be paid at tax filing time, or both.

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[5] The withholding tax is collected from wages paid by an employer. Remuneration paid for services performed by ministers in the exercise of their ministry is not wages for withholding purposes. Int. Rev. Code of 1954, § 3401(a)(9).

[6] As in the case of individual taxpayers, the Code provides both civil and criminal penalties against persons required to collect, account for, and pay over the taxes. See Yudkin, Corporate Officers in Increasing Numbers Face Penalties for Defaults on Withholding Tax, 18 J. Taxation 248 (1963). Employers are subject to a 100% civil penalty for failure to pay over the tax, or for attempts to evade or defeat it. Int. Rev. Code of 1954, § 6672. The Code provides criminal penalties for failures to collect and pay over the tax, Int. Rev. Code, *supra* n. 5 at § 7202, a felony, and to comply with special deposit provisions contained in Code § 7512. Int. Rev. Code, *supra* n. 5 at § 7215, a misdemeanor. If the employer does not withhold the tax and the employee pays it, the employer is subject to all the penalties described above but not for the amount of the tax. Int. Rev. Code *supra* n. 5 at § 3402(d).

[7] Not a very likely alternative, however, according to Milton Mayer, a tax refuser of long standing: "No, the trouble with earning less than [a taxable income] is that it doesn't support a family. Not a big family like mine. If I were a subsistence farmer I might get by, but I'm a city boy." Mayer, The Tribute Money, in Civil Disobedience: Theory and Practice, *supra* n. 1, at 132-133.

HeinOnline -- 20 Clev. St. L. Rev. 217 1971

Notwithstanding the fear, the federal tax lien and the withholding system, the tax refusal movement has grown. The government has, to be sure, obligingly provided the targets. The telephone excise tax, created by Congress to help pay for the Korean War, is strictly a war tax.[8] The recently expired income tax surcharge, enacted at the same time that the telephone excise tax was extended, was also a war tax.[9]

Borrowing from Thoreau, who objected not to the idea of taxation but to a particular tax,[10] the Peacemaker urges its followers to practice "principled" tax refusal, that is to refuse to pay war taxes but not to attempt to destroy the tax gathering system. In practice, however, principled war tax refusal has proved to be an amorphous concept, showing as many variations as there have been responses by the government to the challenge of war tax refusal. These variations do, however, generally derive from a rule that springs from the Peacemaker's concern for making war tax refusal a moral protest and from their disinterest, a fortunate one, in taking on the tax gathering system. Surprising as it may seem, by practicing principled tax refusal, a war tax protestor could

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[8] Under the Excise Tax Reduction Act of 1965, 79 Stat. 136 (1965), 26 U.S.C. § 4251 (1965), the excise tax on telephone service, enacted to help finance the Korean War, was scheduled to be reduced from 10% to 3% on January 1, 1966, and to be completely repealed by January 1, 1969. In the Tax Adjustment Act of 1966, 80 Stat. 38 (1966), 26 U.S.C. § 4251 (1966), however, Congress extended the telephone excise tax at the 10% rate until April 1, 1968, when the scheduled reductions were to begin. In the Revenue and Expenditures Control Act of 1968, 82 Stat. 251 (1968) Congress again, for the 12th time, extended the excise tax on telephone service so that the 10% rate would continue until Jan. 1, 1971. In 1969, Congress again postponed the reduction in this tax until Jan. 1, 1972. Tax Reform Act of 1969, 83 Stat. 487 (1969); See remarks of Senators Griffen and Hartke during debate on the Revenue and Expenditures Control Act of 1968, 114 Cong. Rec. 7532-7533, 8125 (1968). And, on December 31, 1970, President Nixon approved P.L. 91-614, which extends the 10% rate through 1972, all because of the spiraling deficit brought on by the IndoChina War. The effects of the excise tax extensions did not go unnoticed. For the fiscal year ending June 30, 1969, total excise tax collections reached $15.5 billion, up $1.2 billion over the previous year. 1969 was the first year that excise tax revenues exceeded the 1965 high; excise tax revenues for the intervening years had been reduced by the Excise Tax Reduction Act of 1965, according to the Commissioner. 1969 Comm'r. Int. Rev. Ann. Rep. 10. The total amount of excise taxes collected for fiscal year 1970 was even higher: $15.9 billion. Taxes on Parade, Commerce Clearing House, Vol. 58, Part I, No. 5.

[9] In 1968, Congress added § 51 to the Code which imposed a 10% surcharge on adjusted individual income taxes for the period April 1, 1968, through June 30, 1969. Revenue and Expenditure Control Act of 1968, 82 Stat. 251 (1968). In 1969, Congress extended the surcharge to January 1, 1970. Unemployment Taxes, Revision—Surtax, Extension, 83 Stat. 91 (1969). For calendar year 1968, the effective surcharge rate on adjusted individual income taxes was 7.5%; for calendar year 1969, it was 5% of the adjusted tax. The Tax Reform Act continued the surcharge to June 30, 1970, at a 5% annual rate for individuals, or a calendar year effective rate of 2.5%. For expressions of the war tax nature of the income tax surcharge, see Statement of 10 Congressmen, 114 Cong. Rec. 15510 (1968). For the fiscal year ending June 30, 1969, collections of income taxes both individual and corporate reached an all time high of $135.8 billion due, in large part, to the income tax surcharge. 1969 Comm'r. Int. Rev. Ann. Rep. 10.

[10] Through tax refusal, Thoreau wished to "trace the effects of [his] allegiance." Thoreau, Civil Disobedience 43 (1948). By refusing to pay the poll tax he "quiet[ly] declare[d] war with the state," though he "never declined paying the highway tax" because he saw nothing morally objectionable about highway taxes. *Id.*

HeinOnline -- 20 Clev. St. L. Rev. 218 1971

escape all but one of the Code's civil penalties and all of the Code's criminal penalties. To do this, he must file an accurate return and not pay the tax. Even if he refuses to cooperate with the government by filing no return at all, he still may not be violating any of the Code's criminal provisions. His liability for civil penalties, however, will be increased.

Code Penalties, Civil and Criminal

The tax protest of the late Abraham Muste, a prominent pacifist, illustrates some aspects of principled tax refusal and how they fit into the Code. Muste did not file returns, or pay taxes for a four-year period, 1948-1952. Instead, he sent a letter each year to the I.R.S. explaining his position of tax refusal, and suggesting that he would be happy to meet at any time with its agents to explain his position to them. Since it had no returns, the I.R.S. sent its agents to Muste's employer, the Fellowship of Reconciliation, an anti-war group, to reconstruct his income for the period in question. In 1961, the Commissioner assessed deficiencies against Muste, which included penalties for failure to file[11] and the 50% penalty for tax fraud.[12] Muste challenged these deficiencies in the tax court, asserting that the provisions of the tax law which required that he file a return and pay the tax were unconstitutional as applied to him because they interfered with his free exercise of religion under the First Amendment. The tax court rejected Muste's First Amendment claim and upheld the Commissioner on the failure to file penalty but rejected the Commissioner's determination that Muste had committed tax fraud for the years in question.[13] Concluding that the essence of fraud is concealment with intent to deprive the government of the tax, the court held that Muste's conduct was not fraudulent because he did not try to conceal the fact that he had income.[14] The court was not only impressed by the sincerity of Muste's pacifist views, but also by the fact that Muste fully cooperated with I.R.S. agents as he said he would do in the letters he submitted in lieu of his tax returns. The court held, however, that Muste's failure to file did not result from reasonable cause, which would have defeated the failure to file penalty. Rather, applying a reasonable man standard, the court concluded that Muste's failure to file arose from willful neglect because he had not consulted an attorney to confirm his

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[11] Int. Rev. Code of 1939, ch. 2 (supp. M), § 291(a), 53 Stat. 1 [now Int. Rev. Code of 1954, § 6651(a)].

[12] *Id.* at ch. 2 (supp. M), § 293(b), 53 Stat. 1 [now Int. Rev. Code of 1954, § 6653(a) & (b)].

[13] Abraham J. Muste, 35 T.C. 913 (1961).

[14] See Jones v. Commissioner, 259 F. 2d 300 (5th Cir. 1958); held: 50% fraud penalty cannot be sustained against taxpayer who does not file and pay, but elects to use the money for pressing business needs, even though he knows he owes taxes.

HeinOnline -- 20 Clev. St. L. Rev. 219 1971

belief about the unconstitutionality of the filing provisions. Although Muste was sincere in his belief against war and hence could not harbor the bad faith or sinister motive that would make him liable for tax fraud, the court held that his basis for refusing to file was unreasonable, and consequently, the failure to file penalty could be assessed against him.

Civil penalties, like those asserted against Muste, have been continued in the 1954 Code.[15] *Ad valorem* in nature and assessed as part of the tax, these penalties cannot exist if there is no tax liability. In contrast to the criminal penalties in the Code which serve to punish, the civil penalties have a remedial function which derives from the nature of our self-assessment system of taxation. Under this system, each taxpayer must determine his own income taxes. When the taxpayer does not do this, the Commissioner must determine his taxes for him; the civil penalties compensate the Commissioner for performing this function and help preserve the national purse.[16] The amount of the penalty is added to the deficiency, generally the amount of tax the taxpayer failed to report.[17] To illustrate the civil penalties and their rationale, if an individual tries to defraud the government, or does not file a return, or overlooks the law in preparing one, the government will not know how much tax the taxpayer actually owes and it must expend manpower, that is, dollars, to determine how much he failed to report.

Until 1969, the Code provided for interest at a modest 6 per cent rate on the deficiency from the time it was due or on the amount of tax

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[15] *Ad valorem* civil penalties pertaining to income taxes include: (1) the 50% addition for civil fraud, Int. Rev. Code, *supra* n. 5 at § 6653(b); (2) the 5% addition for negligence or for intentional disregard of rules and regulations, Int. Rev. Code, *supra* n. 5 at § 6653(a); (3) the 5% addition each month, up to a maximum 25% of the tax, for failure to file without reasonable cause a timely return. Int. Rev. Code, *supra* n. 5 at § 6651(a)(1); and (4) the 5% addition each month, up to 25% of the tax, for failure to pay, without good cause, the amount of tax shown in the return. Int. Rev. Code, *supra* n. 5 at § 6651(a)(2). Unlike prior law, the 1954 Code prohibits the assessment of the negligence or failure to file penalties where the civil fraud penalty is imposed. 10 Mertens, Law of Federal Income Taxation § 55.01.

[16] Since civil penalties are remedial in nature and benefit the Commissioner, Congress provided that one of the Commissioner's functions is to determine whether the taxpayer is subject to civil penalties, and their amount. As in Muste's case, the taxpayer may petition the tax court for review of the Commissioner's determination before he is required to pay them. Int. Rev. Code, *supra* n. 5 at § 6651; Granquist v. Hackleman, 264 F. 2d 9 (9th Cir. 1959); 10 Mertens, Law of Federal Income Taxation, § 49.128.

[17] "A deficiency is . . . an amount of tax due representing the difference between the amount returned by the taxpayer and the amount which, in fact and law, is due the government." 9 Mertens, Law of Federal Income Taxation, § 49.129; Granquist v. Hackleman, *supra* n. 16. Of particular interest to war tax refusers is the fact that a deficiency may also arise where the taxpayer files an accurate return, disclosing the amount of tax he legally owes, and says in a letter accompanying the return that only part of the tax shown is due to the government. The deficiency, upon which the civil penalties will be assessed, will then be the difference between what the taxpayer recognizes he owes and what he admits he owes. Repetti v. Jamison, 131 F. Supp. 626 (9th Cir.), aff'd, 239 F. 2d 901 (1956); Penn Mutual Indemnity Co., 32 T.C. 653 (3rd Cir.), aff'd, 277 F. 2d 16 (1960).

HeinOnline -- 20 Clev. St. L. Rev. 220 1971

reported as due by the taxpayer on his return but not paid.[18] Under the Tax Reform Act,[19] enacted by Congress in 1969, a late payment penalty was added. It provides that a taxpayer must pay an additional one-half per cent per month for each month that he refuses, without good cause, to pay the income tax shown as due on his return. The late payment penalty therefore raises the effective rate of interest to 12 per cent per year in cases where a protestor refuses to pay his income taxes.

The principled tax refuser, in the Peacemaker sense, can therefore escape all civil penalties, except the late payment penalty, if he files an accurate income tax return, but refuses to pay the tax and waits for the government to collect it. By comparison, the tax refuser who wishes to concentrate exclusively on the excise tax charged for his telephone service and refuse to pay that escapes all of the Code's civil penalties, including the late payment penalty, because no tax returns are involved: the telephone excise tax is assessed by the government and not by the taxpayer. Consequently, the excise tax refuser's only cost will be the 6 per cent interest Congress charges for the use of the government's money.

The government did not prosecute Muste for his protest, a decision that was probably made for tactical reasons, to be discussed later. In any event, Muste's failure to file his tax returns by April 15th, because of strong convictions against war and military spending, no matter how sincere those convictions were, subjected him to a possible $10,000 fine and a year in jail for each year that he did not file a return.

While the civil penalties contained in the Code serve to compensate the I.R.S. for the dollars it must expend to determine and collect the amount a taxpayer owes, the criminal penalties serve to coerce the taxpayer to comply with the requirements of the self-assessment system. Code criminal penalties are arranged in a hierarchical scheme capstoned by the inclusive tax fraud felony, defined to consist of "willful attempt[s] . . . to evade or defeat any tax . . . or the payment thereof."[20] Principled tax refusers would not be subject to a charge of tax fraud, however, because they do not intend to defraud and they do not attempt to defraud, the elements the government must prove to establish this crime.[21] Because the U. S. Supreme Court has defined "attempt" to mean an affirmative act of some kind,[22] passive failures to file a return when one is due or to pay the tax on time, though willful, are not attempts to evade or defeat the tax or its payment within the meaning of

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18 Int. Rev. Code, *supra* n. 5 at § 6601.

19 83 Stat. 487 (1969), amending Int. Rev. Code of 1954, § 6651.

20 Int. Rev. Code *supra* n. 5 at § 7201.

21 Sansone v. United States, 380 U.S. 343 (1965).

22 Spies v. United States, 317 U.S. 492 (1943).

HeinOnline -- 20 Clev. St. L. Rev. 221 1971

the felony provision.[23] Nevertheless, since "punctuality is important to the fiscal system," [24] the defaults listed above, along with willful failures to keep records and to supply information when required make up the rest of the scheme Congress established to preserve the tax gathering system.[25] But the punishment prescribed for breach of these provisions is less severe than that established for tax fraud. Congress made willful failures to file returns, keep records, supply information or pay the tax misdemeanors punishable by a fine of $10,000 and possible imprisonment for up to one year.

The Struggle to Define "Willful" Tax Crimes

Courts have been plagued with some troublesome questions under the misdemeanor provisions; one that has proved to be particularly difficult is under what circumstances can a taxpayer be prosecuted for a non-negligent failure to file a return by April 15th. The controversy centers on what meaning should be given the statutory term "willful". All the circuits agree that a taxpayer cannot be prosecuted if he forgets to file a return. Put carelessness aside, however, and the circuits diverge. The Third[26] and Fifth Circuits hold[27] that the willfulness the government must prove contains these elements: that the accused knew he was required to file a return and that the accused intended to defraud the government by not filing one. The accused must intend to "get away with not paying the tax", as the Third Circuit has said.[28] By contrast, the Second,[29] Fourth,[30] Seventh,[31] Ninth,[32] and Tenth Circuits[33] have held that willfulness under the misdemeanor provision is established when the government shows that the accused knew that he was required

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[23] *Id.* § 7201 establishes two crimes: attempts to evade or defeat (1) the tax or (2) payment of the tax. Cohen v. United States, 297 F. 2d 760 (9th Cir. 1962) illustrates the difference between them. In *Cohen*, the taxpayer filed an accurate return, fully disclosing his income tax liability. But when the government sought to collect the tax, the taxpayer concealed his assets, misrepresented his ability to pay the tax, and transferred some of his assets to avoid collection. The Ninth Circuit held that although the taxpayer did not attempt to evade or defeat the tax, because he filed an accurate return, his actions amounted to attempts to evade or defeat its payment.

[24] Spies v. United States, *supra* n. 21, at 496.

[25] Int. Rev. Code, *supra* n. 5 at § 7203.

[26] United States v. Citman, 246 F. 2d 206 (3rd Cir. 1957).

[27] Jones v. Commissioner, 259 F. 2d 300 (5th Cir. 1958).

[28] United States v. Vitiello, 363 F. 2d 240 (3d Cir. 1956); United States v. McGonigal, 214 F. Supp. 621 (D.C. Del. 1963).

[29] United States v. Schipani, 362 F. 2d 825 (2d Cir. 1966), cert. denied, 385 U.S. 934 (1966).

[30] Yarborough v. United States, 230 F. 2d 56 (4th Cir. 1956).

[31] United States v. Matosky, 421 F. 2d 410 (7th Cir. 1970), cert. denied, 398 U.S. 904 (1970).

[32] Martin v. United States, 317 F. 2d 753 (9th Cir. 1963).

[33] Haskell v. United States, 241 F. 2d 790 (10th Cir. 1957).

HeinOnline -- 20 Clev. St. L. Rev. 222 1971

to file a return by April 15th and purposely did not file one then. The government need not, in other words, prove a specific intent to defraud.[34] The split between the circuits over the meaning of "willfulness" in the failure to file provision arose because of their differing interpretations of two significant U. S. Supreme Court cases, *Murdock v. United States*[35] and *Spies v. United States*.[36] Taken together, the two cases discuss the willfulness element in the misdemeanor provision, and more: they illustrate a striking difference between what the government must prove to convict an individual under the failure to file provision and the equally important failure to pay provision, a difference that has confounded the courts in their attempts to set standards for conviction under the misdemeanor provisions.

In *Murdock*, petitioner was charged with the misdemeanor of withholding information. On appeal he contended that he would have incriminated himself under the Fifth Amendment if he had turned over the information to government officials. The precise question before the Court was this: Does "willfully" as used in the misdemeanor statute mean more than voluntary? In concluding that it did, the Court held that "willfulness" contained an element of "bad motive." Congress, the Court said, never intended that an individual should be punished criminally under the tax laws for his mere failure to conform to a standard of conduct prescribed in those laws. More specifically, the Court held that petitioner's "good faith belief" in the lawfulness of his act negated the bad motive the government must prove to make out the offense. Although the Court concluded that petitioner's good faith belief was a complete defense to the charge, it waited 10 years before it defined what it meant by the term "bad motive", the additional element which the government must prove along with the voluntary nature of the accused's default to establish willfulness under the misdemeanor provision. In *Spies v. United States*,[37] the Court held that the bad motive it mentioned in *Murdock* simply meant that the government must prove that the accused was aware of the statutory duty and that he intended to breach it. But the Court carved out a significant exception to the government's burden of proof under one of the misdemeanors. In a prosecution for failure to pay the tax, the Court said, the government must prove something further—that the accused had an "evil motive" along with the "bad purpose" it had just defined. Since *Spies* was the last Supreme Court case to deal with the willfulness element in the

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[34] "The only bad purpose or motive required is a deliberate intent not to file when the defendant knew he should have filed so that the government would not know the extent of his liability." Yarborough v. United States, *supra* n. 29, at 61.

[35] 290 U.S. 389 (1933).

[36] 317 U.S. 492 (1943).

[37] *Id.*

HeinOnline -- 20 Clev. St. L. Rev. 223 1971

misdemeanor provision, it was up to the lower courts to give meaning to the "evil purpose" which the Court had abandoned to them. And the few that have dealt with failure to pay prosecutions[38] have construed this "evil motive" to mean a specific intent to defraud, which, for war tax refusal purposes, lifted this misdemeanor right out of the Code.

In *Spies,* the Court dealt with some distinctions between the felony and the misdemeanors. The precise question before the Court was this: Do two misdemeanors, a failure to file a return and a failure to pay the tax, taken together, establish the felony, tax fraud? The Court concluded that they did not, holding, in substance, that two passive acts cannot be combined to yield the affirmative act required for tax fraud. The significance of the case from the tax refuser's viewpoint is in its discussion of the willful element as a component of the felony and of the misdemeanors. The Court drew the following distinctions between the felony and misdemeanors, and among the misdemeanors themselves: (1) to establish willfulness in tax fraud cases, the government must prove that the accused had a specific intent to defraud it; (2) to establish willfulness in cases where the accused is charged with failing to measure up to Code prescribed standards of conduct the government must prove only that the accused was aware of the conduct and that he intentionally, as opposed to negligently, did not measure up, the "bad purpose" of *Murdock;* (3) and, to establish willfulness in a failure to pay case, the government must prove some element of evil motive because, as the Court said, "In view of our aversion to imprisonment for debt, we would not, without a clear congressional intent, assume that mere knowing and intentional default in payment of a tax, where everything is disclosed, is intended to constitute a criminal offense of any degree." [39]

Spies and *Murdock* have generated a considerable amount of confusion among the circuits. In their insistence in failure to file cases that the government must prove that the accused intended to defraud it, the Third and Fifth Circuits seem to be equating the "bad purpose" element of *Murdock* with the "evil motive" element of *Spies* when the two are not in the same. In *Spies,* the Court first defined what it meant in *Murdock* by "bad purpose," namely, knowledge of the obligation and an intent to evade it,[40] and then went on to say that an "evil motive" had to be proved by the government in failure to pay cases. The few courts

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[38] United States v. Goodman, 190 F. Supp. 847 (N.D. Ill. 1961); Mitchell v. Commissioner, 18 F. 2d 308 (5th Cir. 1941) (wagering tax prosecution); see United States v. Palermo, 259 F. 2d 872 (3d Cir. 1958); United States v. Fahey, 411 F. 2d 1213 (9th Cir. 1969); but see, United States v. Magus, 365 F. 2d 1007 (2d Cir. 1966).

[39] Spies v. United States, *supra* n. 35, at 498.

[40] In failure to file cases, according to the Court, "mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness." *Id.*

HeinOnline -- 20 Clev. St. L. Rev. 224 1971

that have dealt squarely with failure to pay cases, have concluded that this "evil motive" means a specific intent to defraud, which is what the government must prove in a prosecution for tax fraud. Perhaps this is why the Third and Fifth Circuits contend that the willfulness requirements for the felony and misdemeanors are identical. Yet the Second, Seventh, and Ninth Circuits are just as capable of painting with as broad a brush. While these circuits correctly hold that the government need only prove the "bad purpose" established in *Murdock,* as defined in *Spies,* to secure a conviction under the failure to file provision, they appear to have ignored the crucial distinction the Court made in *Spies* between the failure to pay crime and the rest of the misdemeanors. By lumping all the misdemeanors together, these circuits insist that the willfulness the government must prove to secure a conviction under the felony is greater than the willfulness it must prove to secure a conviction under the misdemeanors. Unfortunately, the argument among the circuits over the quality of willfulness that the government must prove in a failure to file prosecution—and what is certain to develop into a real imbroglio, what quality of willfulness must the government prove in a failure to pay prosecution—could plague the courts for some time to come, for the Supreme Court recently had an opportunity to clarify this area of the law but turned it down.[41]

The failure to pay crime has been part of our tax law for over 40 years,[42] yet the government did not win its first conviction under it until 1957.[43] Binky Palermo, a notorious gambler, not the typical war tax protestor, to be sure, did not pay his income taxes over a five-year period, although he paid them before his case came to trial. In the meantime, he paid money that would have gone for taxes to other creditors, while maintaining, as the Appellate Court noted, a comfortable standard of living. On appeal, the Third Circuit reversed his conviction, suggesting that a taxpayer need not prefer the government as a creditor. Even though evidence in the record indicated that Palermo sought to prevent collection of the tax, the court was impressed by the fact that he eventually paid it, albeit some years later, and held that Palermo

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[41] In United States v. Matosky, 421 F. 2d 410 (7th Cir. 1970), the Seventh Circuit expressly rejected the appellant's request for an instruction—and with it, the reasoning of the Third and Fifth Circuits—that the "existence of a tax associated motive —a failure to file [in order that] the government would not know the extent of his liability" is necessary for conviction under the failure to file provision. *Id.* at 412. Citing Murdock, the court held that "defendant's motive need not be restricted to an intent to defraud the government for § 7203 to be violated," *Id.* at 413, a correct statement about § 7203, as far as it goes. The Supreme Court denied cert., 398 U.S. 904 (1970).

[42] First appearing in § 1114(a) of the Revenue Act of 1926, 44 Stat. 116, then as § 146 (a) of the Revenue Act of 1928, 45 Stat. 835, § 145(a) of the Revenue Act of 1936, 49 Stat. 1703, and as § 145(a) of Int. Rev. Code of 1939, 53 Stat. 62 before becoming § 7203 of the 1954 Code.

[43] United States v. Palermo, 152 F. Supp. 825 (E.D. Pa. 1957).

HeinOnline -- 20 Clev. St. L. Rev. 225 1971

did not have the specific intent to evade the tax.[44] Similar in result is *Goodman v. United States,*[45] the last reported decision of a failure to pay case. Goodman was acquitted because he, like Palermo, did not intend to evade the tax. To show his wrongful intent, the government proved that Goodman attempted to prevent it from collecting the tax by using his money for other purposes and by stalling negotiations to settle his liability. But the Court considered it important that Goodman, a lawyer, was in financial difficulty and had trouble paying his bills. In acquitting Goodman, the court relied upon *Spies* and its dictum that the case fell within the shadow of imprisonment for debt, adding, as the Court did in *Palermo,* that one need not borrow money to pay his tax, nor is there a requirement that one must prefer the government as a creditor.[46]

The failure-to-pay cases have special significance for the thousands of people who are not paying the telephone excise tax. They instruct that the government is virtually powerless to prosecute them for their protest so long as they do not conceal assets out of which the government may collect the tax. If war tax refusers should attempt to conceal assets, the government could successfully argue that they are trying to defraud it, and thereby establish the felony.[47] The failure to pay cases also instruct the war tax refusers who file income tax returns by April 15th that report the amount of tax the government can legally claim. All non-paying tax protests that do not tamper with the reporting requirements enjoy an equal status under the Code as far as its criminal provisions go. The only recourse the government has is to collect the tax under its lien, as its own expense,[48] and charge interest for the use of its money. Still, the income tax refuser has a significant problem that the excise tax refuser does not have to face, namely, the withholding tax. Withholding of income tax on wages could quite likely leave the income tax protestor without means to refuse war taxes. No doubt Congress had this in mind when it established the withholding scheme at the dawn of the country's entry into World War II.[49]

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[44] Palermo v. United States, 259 F. 2d 872 (3d Cir. 1958).

[45] 190 F. Supp. 847 (N.D. Ill. 1961).

[46] *Id.* at 857.

[47] Proof that the taxpayer concealed assets to avoid collection will also establish the specific intent to defraud which the government must prove in a prosecution under § 7201 for attempts to defeat payment of the tax. Cohen v. United States, *supra* n. 22. One might therefore ask how the government proves the misdemeanors of failing to file and failing to pay in jurisdictions that require it to prove a specific intent to defraud along with these defaults. As in a tax evasion case, where the attempt itself is not enough to establish the intent, the government looks to collateral conduct of the accused, including his tax paying habits for prior years. Emmich v. United States, 298 F. 5 (6th Cir. 1924), cert. denied, 266 U.S. 608 (1924); United States v. Gannon, 244 F. 2d 541 (2d Cir. 1957); but see United States v. Long, 257 F. 2d 340 (3d Cir. 1958).

[48] Int. Rev. Code, *supra* n. 5 at § 6332(c)(1).

[49] Current Tax Payment Act of 1943, 57 Stat. 126 (1943).

HeinOnline -- 20 Clev. St. L. Rev. 226 1971

The Withholding Dilemma

The withholding system effectively blocks a mass tax protest in two ways: it affects employees who might wish to refuse taxes and the small number of employers who might wish to help them. Employees, as the Code defines them,[50] are subject to withholding of income at the source of their wages. Usually the tax withheld by the employer is sufficient to equal or closely approximate the amount of tax an individual owes by tax filing time, but not always. If a husband and wife work, for example, the amount withheld will not equal their tax, but they will not usually be so under-withheld that they are confronted with a large tax bill on April 15. The Peacemakers *Handbook* suggests several ways to avoid the withholding vortex. One may become a minister of the gospel, an independent contractor, hold part-time jobs, falsify the W-4 form, and so on. But most people, though warm to the idea of war tax refusal, are not willing to radically change their life style to engage in protest, just as large numbers of people are not willing to go to jail as a consequence of their protest. In terms of the numbers who would join it, therefore, the war tax protest movement is corralled by the withholding system. The government knows this, for it has reacted vigorously against attempts by war tax refusers to escape it.

The withholding provisions, like the self-assessment system from which they arise, leave it up to the employee to determine how much income tax will be withheld. The employee submits a withholding exemption certificate, W-4 form for short, to his employer in which he lists the number of exemptions he claims, and the employer determines the amount of tax to be withheld by using tables contained in the Code geared to the number of exemptions contained in the form.[51] The employer is not responsible for the accuracy of the W-4 form. Realizing that the more exemptions they claim, the less tax the employer will withhold, some tax refusers have escaped withholding completely by claiming more exemptions than the Code allows[52] on the rationale that the Code, like the government that enforces it, has too narrow a view of human dependency. These protestors feel that they are responsible for the financial support of all U. S. troops in Vietnam or the moral support

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[50] Int. Rev. Code, *supra* n. 5 at § 3401(c).

[51] The Handbook contains tables that show how much income an individual may earn without incurring tax liability. For the period Jan. 1, 1970, to July 1, 1970, a taxpayer may earn $1725 if he claims himself as his only exemption and another $625 for each additional exemption he claims. If he claims, for example, three exemptions he may earn $55.99 tax-free dollars per week or $239.99 tax-free dollars per month. These figures will increase slightly when the personal exemption increases to $650 on July 1, 1970. Peacemakers, Nonpayment of War Taxes 13-14 (3d rev. ed. 1967).

[52] Int. Rev. Code, *supra* n. 5 at § 151 which sets forth the categories of personal exemptions.

HeinOnline -- 20 Clev. St. L. Rev. 227 1971

of all the world's peoples and claim these groups as exemptions on their W-4 forms.

Many tax refusers have eschewed this tactic, arguing that falsifying the W-4 form to claim too many exemptions is not in keeping with principled tax refusal which holds that nothing is to be concealed from the government. By contrast, those claiming excessive exemptions argue that there is nothing inconsistent between filing false W-4 forms and principled war tax refusal. Obviously frustrated over what the withholding system does to their protest, these protestors contend that the matter of withholding is strictly between them and their employer since the tax is not due to the government until April 15th. Only on that date, according to their line of reasoning, will they disclose the correct number of exemptions to the government, if they file a return; or, if they do not, to Internal Revenue agents who demand such information. The government can then, if it wishes, enforce its lien and collect the tax. Meanwhile, this group will avoid prepaying the tax by whatever means necessary, and that includes by filing W-4 forms that claim all mankind as family.

Thus, the principled war tax refuser contends that he is avoiding taxes legally, and not evading them. The distinction is crucial for the U. S. Supreme Court has recognized that tax avoidance is both popular and quite permissible.[53] Unfortunately, the line between evasion and avoidance is often elusive. While, as just discussed, on the one hand, the principled tax refuser has no interest in defrauding his government, on the other, if he falsifies a W-4 form to increase his exemptions and thereby decrease the income tax that is withheld he appears to be doing just that. Consequently, it is necessary to determine whether an employee furnishes false information to the government when he tampers with his W-4 form; and whether, in any event, the giving of such false information amounts to tax evasion, which is any attempt to defeat the tax or its payment.

Under the withholding provisions, the employer uses the W-4 form to withhold an amount from the employee's salary that should approximate the employee's final tax liability on that salary. Under the Code, however, this final tax liability is determined when the tax is due, on the date that the employee is required to file the return and assess it. The employee is not therefore furnishing information to the government when he files a W-4 form with his employer; nor is he concealing information from the government when he files a false one. As far as tax evasion is concerned, the crime requires a specific intent to defraud the government of a tax that is due, aside from an affirmative act.[54] The tax

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[53] See Crooks v. Harrelson, 282 U.S. 55 (1930).

[54] United States v. Mollet, 290 F. 2d 273 (2d Cir. 1961).

HeinOnline -- 20 Clev. St. L. Rev. 228 1971

refuser who files a false W-4 form with his employer would appear to be outside this definition for two reasons: First, as mentioned above, he does not intend to defraud the government and second, any income tax he might owe is not due until April 15th.

In apparent recognition of these principles, Congress has established a criminal penalty that deals specifically with the falsification of W-4 forms. Section 7205,[55] which applies "in lieu of" any other Code criminal penalties, makes it a misdemeanor punishable by a fine of $500 and possible imprisonment for up to one year to tamper with the W-4 form under the circumstances spelled out in that section.

An interesting argument could be made, which will not be explored in great detail here, that Section 7205 may not operate in the way that its drafters intended. The argument rests on the idea that while the provisions of Section 7205 prohibit an employee from filing false W-4 forms when he is required by Section 3402 to file them, these provisions do not appear to prohibit an employee from filing false W-4 forms at any other time. Since, as mentioned above, the employer withholds or does not withhold on the strength of the W-4 form alone, one may use the language of these sections to make the argument that an employee may file a false W-4 form whenever he is not required to file one under Section 3402 and wipe out withholding for those periods.[56]

Section 3402 requires an employee to file a W-4 form only when the W-4 form "then in effect" claims more exemptions than the employee is entitled to claim under the Code. To rescue employers from the tremendous amount of bookkeeping that would be required if they were to give immediate effect to each W-4 form filed with them, Congress provided in Section 3402 that such forms shall take effect only on specified "status determination dates," namely, January 1st, May 1st, July 1st, and October 1st of each year. The Code grants the employer the option, however, to give effect to W-4 forms for the next payment of wages. No matter which scheme the employer follows, the important consideration

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[55] "Any individual required to supply information to his employer under section 3402 who wilfully supplies false or fraudulent information, or who wilfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall, in lieu of any other penalty provided by law . . . upon conviction thereof, be fined not more than $500, or imprisoned not more than one year, or both." Int. Rev. Code, *supra* n. 5 at § 7205.

[56] At first blush, subsection (C) of Code § 3402(f)(2) appears to suggest that an employee must submit a new W-4 form whenever he wishes merely to change the number of exemptions he will claim for the following calendar year. § 3402(f)(2)(C) provides that the employee "shall, in such cases and at such times as the Secretary or his delegate may by regulations prescribe" furnish his employer with a W-4 form when "the number of withholding exemptions to which the employee will be, or may reasonably expected to be entitled" at the beginning of his next taxable year is "different" than the number he presently claims. Int. Rev. Code, *supra* n. 5 at § 3402(f)(2)(C). By Treas. Reg. § 31.3402(f)(2)-1(C), (1957), as amended, T. D. 7048 __ Cum. Bull. __, however, the Commissioner has required an employee to furnish a W-4 form to his employer only when his exemptions decrease.

HeinOnline -- 20 Clev. St. L. Rev. 229 1971

is that a delay exists between the time a W-4 form is filed with an employer and the time that it goes into effect. Thus, to take an example using the effective date scheme, if an employee files a W-4 form on December 1st that is sufficient, because it overstates his exemptions, to eliminate withholding of tax, it will take effect on January 1st. On January 1st—actually, within 10 days of that date—the employee is required under Section 3402 (and Section 7205) to file an accurate W-4 form. But this form does not serve to restore the amount of tax that should be withheld until the next status determination date, which is May 1st.

Meeting Tax Refusal Head On

A crucial factor to consider here is of course the likely political response to tax refusal. If the loophole just described is utilized by large numbers of protestors and upheld by the courts, Congress will move swiftly to close it. In practical effect, putting considerations of principle aside, any wage earner who takes advantage of the hiatus between Sections 7205 and 3402 can defeat the withholding scheme. A war-minded Congress would never permit its most effective tax gathering device to fall by the wayside.

The Executive Branch is no doubt best equipped to deal with a broadly based tax protest if one should arise. By adopting a vigorous enforcement posture, the Department of Justice and the I.R.S. could chill and destroy any mass movement aimed at avoiding war taxes. These agencies have in fact quietly begun such a campaign. Last September, the Justice Department successfully prosecuted a war tax refuser for giving false and fraudulent information on his W-4 form. Shea, the defendant, claimed twenty dependents—fourteen more than he was entitled to under the Code—and wrote a letter to I.R.S. explaining his protest.[57] The trial went very well for the government: Shea was, apparently, the first person ever convicted under Section 7205 and the judge imposed the maximum sentence. In November, the Justice Department won its second conviction under Section 7205 against a war tax refuser, and a third, fourth, and fifth person were recently indicted under the same provision.[58] The I.R.S. has also been busy. An official of that agency told this writer that the I.R.S. intends to collect every delinquent telephone excise account, not a small task by any measure. According to this official, collections were approximately eight months behind.

Yet, no matter how much the administration may wish to crack down on war tax protestors, it still must contend with certain inhibiting factors built into the self-assessment system itself. The Justice Depart-

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[57] The Peacemaker, July 18, 1970, p. 1, col. 3.

[58] The Peacemaker, Feb. 6, 1971, p. 2, col. 2.

HeinOnline -- 20 Clev. St. L. Rev. 230 1971

ment, which stands guard over the self-assessment system, must exercise extreme care before prosecuting anyone under the Code's criminal provisions for a reason as old as the law itself. Each time an accused is acquitted, individuals who have been acting as the accused will be encouraged to continue and others who were simply contemplating such conduct will be "invit[ed] to play the game." [59] Likewise, where confusion exists about whether the conduct is unlawful at all, for instance, in a failure to pay case, the government becomes virtually powerless to try to prohibit the conduct and it must resort to indirect methods, such a rigorous collection of delinquent accounts, to deter the threat to the system. This no doubt accounts for the fact that the government has not, in recent years, charged anyone under the failure to pay provision, choosing instead to prosecute war tax refusers under the more crucial, and as yet untested, Section 7205 penalty.

From the collection end of it, the I.R.S., which must protect the national revenue, cannot squander that revenue no matter how confidently it asserts it will collect every delinquent excise tax account. Eliminating fixed overhead costs, the average cost to the I.R.S. of collecting delinquent accounts by telephone or letter is $22.96;[60] of course, the few war tax refusers who yield to this kind of persuasion will probably be far outnumbered by the many who, having begun their protest, will continue it to the end. So, given the relatively small amount of excise tax assessed against the average telephone subscriber each month and accepting a recent estimate of excise tax refusers as reliable,[61] the cost to the I.R.S. of collecting all delinquent telephone excise accounts is prohibitive. This is not to suggest that the I.R.S. is about to give up against the non-paying war tax protestor, for it may resort to some selective collections to induce compliance. Still, because of the practical limitations with which the enforcement authorities must contend, it appears extremely unlikely that any principled protestor will be successfully prosecuted for not paying his tax.

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[59] "Uniformly, it is recognized that the predominant objectives to be secured by [the conviction] is the necessity of deterring others from committing [tax] fraud upon the government. . . . The thoroughness and conservatism of the investigative and review process is indicated by the fact that around 2 per cent or less of the 100 [full-scale investigations by I.R.S. of tax fraud cases] are brought to trial and acquitted." Address by Commissioner Thrower, American Bar Foundation, February 22, 1970. The overall conviction rate for tax crimes is about 95%. See 1967 Att'y. Gen. Ann. Rept. 329.

[60] Letter from the I.R.S. to Representative Charles H. Vanik, July 10, 1970.

[61] About 18,000 according to the Peacemakers. Peacemaker Movement, Nonpayment of War Taxes 47 (3rd rev. ed. 1967).

HeinOnline -- 20 Clev. St. L. Rev. 231 1971

Tax Refusal Today: A Gentle Rebellion

At this stage of their protest, at any rate, war tax refusers do not seriously believe that they will bankrupt the republic by not paying their taxes. They have too much respect, on the one hand, for the federal tax lien, the device that allows the government, when diligent, to collect before anyone else may collect; on the other, they still stand in fear of their government for what it may do to them. In the face of these realizations, many question the value of a protest that ends with the government getting its due, with interest. Apparently, war tax refusers in this country would rather consider their protest as an exercise in individual conscience, more in the tradition of Thoreau than Ghandi. Many of them are simply refusing to pay a few dollars of income tax or telephone excise tax and investing them in the alternative funds described earlier. According to the *Peacemaker,* which serves as a clearinghouse for news of these funds, alternative funds are being created throughout the nation.[62] From the tax protestor's standpoint, they have something to recommend them. Most important, he is supporting others who believe as he does. Secondly, management of the alternative funds is typically handled by unincorporated associations and non-profit corporations, which suggests that if these entities carry out the business for which they were formed the government would appear to be powerless to seize their assets for the taxes that their members are not paying.[63] Finally, as far as the personal freedom of the members themselves is concerned, since the courts have indicated that a person may do what he wishes with his money so long as he does not deliberately prevent the I.R.S. from collecting the tax, it is unlikely that the government will be able to convict them, either for tax evasion or under the misdemeanor provisions.

Yet, the threat of harassment remains; and considering the recent prosecutions under Section 7205, the government apparently is not willing to ignore the challenge of war tax refusal. Given these factors and barring a dramatic shift in the economy or in the conduct of the war, the conventional protests will probably continue to best express the hopes of the dissident masses.

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[62] Conscientious Tax Consultants, a non-profit Ohio corporation established by members of Clergy and Laymen Concerned About Vietnam, is such an alternative fund operating locally.

[63] Moline Properties, Inc. v. Commissioner, 319 U.S. 436 (1963). The term "business," for tax purposes, is construed broadly. See generally, 7 Mertens, Law of Federal Income Taxation § 38.10.

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